

STATE OF VERMONT
ENVIRONMENTAL BOARD
10 V.S.A., Chapter 151

Re: Howard A. **Manosh**
H. A. **Manosh** Corp.
Martin K. Miller, Esq.
Miller & Eggleston, Ltd.
P.O. Box 1489
Burlington, VT 05402-1489

Findings of Fact, **Conclu-**
sions of Law and Order
Declaratory Ruling #163

This decision pertains to a Petition for Declaratory Ruling filed with the Environmental Board ("the Board") on February 29, 1984 by Howard A. **Manosh** and the H. A. **Manosh** Corporation ("**Manosh**") seeking a determination as to the applicability of 10 V.S.A., Chapter 151 (Act 250) to the operation of a gravel pit in Morristown, Vermont.

On July 26, 1984 the Board notified the parties of its intent to designate its Chairman to act as administrative hearing office in this matter pursuant to Board Rule 41 and 3 V.S.A. §811. Having received no objection, a public hearing was convened on August 13, 1984 in Hyde Park, Vermont, with Margaret P. Garland acting as hearing officer. The following participated as interested parties at the hearing:

Petitioner **Manosh** by Martin K. Miller, Esq.;
State Agency of Environmental Conservation and
Department of Fish and Wildlife ("**AEC**") by Dana
Cole-Levesque, Esq.;
Town of Morristown and Morristown Planning Commission
by Paul Hughes;
Donald Avery, an adjoining property owner, by Stephen
Stitzel, Esq.

The hearing was recessed on August 13, pending a view of the site, preparation of this Proposal for Decision, a review of the record and deliberation by the full Board. A brief view of the site was conducted on the 13th. The Board heard oral argument from the parties on August 22, in Montpelier, Vermont. On August 29, the Board determined the record complete and adjourned the hearing. This matter is now ready for decision. The following findings of fact and conclusions of law are based upon the record developed at the hearing.

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I. ISSUES RAISED BY THE APPEAL

Manosh argues that the "Duhamel Pit" consisting of two extraction sites on a single tract of land, existed prior to the adoption of Act 250 and, therefore, is exempt from the land use permit requirements of 10 V.S.A. §6081. In contrast, AEC and Avery argue that at least one site, the "Barn Pit" adjacent to the Avery premises, did not pre-exist Act 250 and may not be operated without the prior issuance of a land use permit. Avery argues in the alternative that if the pit was pre-existing, it has been abandoned through non-use.

II. FINDINGS OF FACT

1. **Manosh** currently owns an approximately 98.5 acre parcel of land in the Town of Morristown adjacent to the Lamoille River (Exhibit #4). The **Manosh** land is a portion of the former "Duhamel Farm." Avery owns an approximately 15 acre parcel immediately east of the **Manosh** tract which is also a portion of the Duhamel Farm and which includes the former Duhamel homestead.
2. On April 24, 1968 Paul and Winifred Duhamel conveyed their 350 acre farm to Willis and Lillian Hicks (Exhibit #10). The Hicks never lived on the premises but, instead, retained Leonard Hammond to live on the premises and operate a cattle farm. On December 30, 1969, the Hicks conveyed the Duhamel Farm (less portions of that tract previously conveyed in four separate deeds) to Noel Lussier and Clarence Miller, Jr. (Exhibit #8).
3. The Farm was conveyed by way of straw transfer to Clarence Miller, Jr. and Clarence Miller, Sr. on January 23, 1970. The Millers then conveyed the premises to Thomas and Elaine Hirschak on February 9, 1972 (Exhibit #17). Avery acquired his portion of the Duhamel Farm in 1979.
4. There are currently two gravel extraction sites located on the **Manosh** tract: the so-called "Barn Site" located immediately south-southwest of the Avery house and barn, and the so-called "River Site" located approximately one-quarter mile due north of the Avery premises adjacent to the Lamoille River. The Barn Site and the River Site are part of a single, continuous deposit of gravel. While the River Site is not being used at present, the Barn Site has **been heavily** excavated by **Manosh** within the last several weeks.

5. The River Site was not opened until 1968. However, in 1963, sand and gravel were extracted from the Barn Site for use by Morristown in road improvement projects. Mr. Duhamel was paid \$286.30 by the Town in 1963 for the approximately 1,900 yards removed from the pit.
6. Intermittently throughout the Summer of 1968, Howard A. **Manosh** extracted gravel from the Duhamel Farm and removed it from the site in four dump trucks. Each truck had a capacity of approximately seven cubic yards. One truck operated by Albert Farr operated at the site on 11 different days during that summer and withdrew a total of approximately 700 yards of gravel.
7. While no definitive testimony was presented concerning the relative amounts extracted from the two pits, gravel was extracted from both sites in 1968. Extraction started at or near the Barn Site. Gravel was then sampled along the hillside running northerly along the west bank of the Lamoille River until the River Site was selected for extraction because of the quality of gravel at that location and because of the minimal depth of overburden covering the gravel. **An** access road was installed and gravel was then removed from both the River Site and the Barn Site, depending on the desired quality of material.
8. Intermittent extraction by **Manosh** at the Duhamel Farm continued at least until 1970. The Town of Morrisville also drew gravel from the Duhamel Farm in 1968, removing approximately 4,200 yards from the River Site and paying Mr. Hicks \$.25 per yard. Furthermore, Richard Godfrey extracted gravel at the Farm on at least 10 different occasions between 1968 and 1970, removing in the range of 200 yards on each occasion. Howard Ring removed approximately 900 yards in 1967, 1968 and 1969 and, between 1973 and 1974, Mr. Ring removed approximately 10,000 yards of material from the **River** Site. In 1974 Mr. Hirschak, the current owner, authorized the extraction of substantial amounts of gravel from the Barn Site. Finally, a 1979 aerial photograph of the area appears to indicate open pit areas immediately south of the Avery barn and at the River Site, areas which are substantially larger than revealed in aerial photographs taken in 1974 (Exhibits #2, #13 and #14)./1/
9. Operation of the pit raises the potential for significant impacts under the Criteria of 10 V.S.A. **§6086(a)** as follows:

/1/ On August 22, during the deliberation, the Board reviewed the transcript of the August 13th hearing which was not available when the Proposal for Decision was prepared. Our findings concerning extraction by the Town and Mr. Ring in 1968 have been revised based on the transcript.

- a. Criterion 1: the regular movement of trucks on the access roadway may cause a dust problem (Exhibit #16).
- b. Criterion 3: a spring which serves as a water source for the Avery premises is located on the **Manosh** property south of the Barn Site and could be adversely affected if not protected from future excavation.
- c. Criteria 1 and 4: both the River Pit and the Barn Pit are close to the Lamoille River, a tributary of the Lamoille River (Kenfield Brook) and drainage swales emptying to those waters; without proper erosion protection, stormwater washing through the excavated areas could result in the deposit of silt into state waters (Exhibit #2).
- d. Criterion 5: operation of large trucks on narrow Town Highway #10 poses a threat of unsafe conditions.
- e. Criterion 8: because the Barn Pit is now visible from surrounding areas, further excavation may adversely affect the aesthetics and scenic beauty of the area.
- f. Criterion 9(B): soil erosion, stormwater runoff and dust pose a threat to the **Averys'** adjacent agricultural operation.
- g. Criterion 9(K): the Vermont Department of Fish and Wildlife apparently owns lands adjacent to the **Manosh** tract which could be adversely affected by gravel operations.

III. CONCLUSIONS OF LAW

10 V.S.A. §6081(a) requires that a permit be secured prior to the "commencement of development." However, subparagraph (b) of the same section exempts from the permit requirement any development that was in existence as of June 1, 1970. We conclude that were **Manosh** proposing to now establish for the first time the two extraction sites on the Duhamel Farm, such activity would constitute the commencement of construction for commercial purposes subject to the permit requirements of Act 250.

However, we must conclude that the gravel extraction operation on the Duhamel Farm was in existence prior to June 1, 1970, has not been abandoned and does not require the issuance of an Act 250 permit. We have previously found that in 1963 substantial amounts of gravel were removed from the Barn Site and payment was made for that extraction. We also found that substantial extraction again occurred in

1968 both at or near the Barn Site and at the River Site, and that extraction continued intermittently until 1970. We further found that large amounts of material were removed again in 1973 and 1974. Finally, we found that **aerial** photography reveals an expansion of the two pits between 1974 and 1979. We must, therefore, conclude that the gravel **operations pre-dated Act 250 and have continued intermittently since their inception.**

We struggled to reconcile the directly conflicting testimony presented by the several witnesses with personal knowledge of the Duhamel Farm's history. The witnesses were in diametric opposition concerning whether or not material was removed from the Barn Site between 1968 and 1970. At least five of the Petitioner's witnesses testified that they had personally drawn gravel from the Barn Site during the period in question. The property's owner at the time, and the tenant farmer residing at the Duhamel Farm testified clearly that no material was removed from the area near the barn. We are persuaded by the narrowest of margins that some material, however limited, was removed from the Barn Site in the period from 1968-1970.

However, this conclusion is not determinative: we have concluded that the Barn Site was commercially used in 1963 and all parties agree that the River Site was opened for commercial use in 1968. The two sites are part of a single, contiguous gravel deposit. It is not, therefore, essential that extraction regularly occur at both withdrawal sites. The record supports the conclusion that the single deposit was the source for commercial extraction intermittently from at least 1963 to the present. We conclude that the **Manosh** extraction at the Duhamel Farm pre-exists Act 250 and does not now require an Act 250 permit.

This conclusion is conditioned upon operation of the pit in a manner consistent with past history. Changes of the sort noted in Re: Clifford's Loam and Gravel, Inc., Declaratory Ruling #90, November 6, 1978, may trigger the permit requirements of 10 V.S.A. §6081. Furthermore, any significant increase in the rate of extraction from the Duhamel Farm will also trigger the permit requirement. **Evidence** concerning extraction in 1968 provides the clearest baseline concerning volume of material extracted: the **Manosh** vehicles withdrew an estimated 3,000 yards, the Town withdrew approximately 4,200 yards, Mr. Godfrey likely withdrew at a rate not exceeding 2,000 yards per year, and Mr. Ring withdrew 900 yards. So long as the total volume withdrawn from the **Manosh** premises on an annual basis does

not significantly exceed 10,000 yards, an increase in volume alone will not trigger the permit requirements of Act 250./2/

Finally, it was amply clear from the record that Mr. **Manosh** has not acted as a "good neighbor" in the operation of a pit located so precariously close to Mr. Avery's residence. Apparently little has been done to control dust. Only through the vehicle of an Assurance of Discontinuance did **Manosh** agree to erosion control measures. Daily truck traffic on a narrow town road of up to 100 trips per day seems excessive. While it may be true that Mr. Avery could have anticipated use of the **Manosh** property for gravel extraction, so too could Mr. **Manosh** have anticipated adjusting his extraction operation in view of the proximity of the Barn Pit to the Avery residence. We encourage Mr. **Manosh**, Mr. Avery, ARC, and the Town to make a good faith effort at mutually accommodating the respective interests of the parties.

/2/ While we refrain from specifically defining the term "significant," a 10% increase in annual withdrawal volume **would** most likely be sufficient to constitute a "substantial change" if accompanied by the potential impacts identified in Finding #9, above. Furthermore, if Petitioner can more specifically document pre-1970 extraction rates, on appropriate petition we will reconsider our conclusion concerning the historical rate of extraction at the Duhamel Farm.


IV. ORDER

For the reasons stated above the Board concludes that continued extraction of gravel by **Manosh** from the Duhamel Farm, in a manner consistent with the history of past operations on the site, may occur without prior issuance of a land use permit pursuant to 10 V.S.A. 56081. However, Petitioner must secure a land use permit should he extract at a rate significantly exceeding 10,000 yards each year or should the nature of the operation otherwise substantially change.

Dated at Montpelier, Vermont, this 29th day of August, 1984.

ENVIRONMENTAL BOARD

By:


Margaret P. Garland, Chairman

Members participating in
this decision:

Margaret P. Garland
Ferdinand Bongartz
Lawrence H. Bruce, Jr.
Dwight E. **Burnham**, Sr.
Melvin H. Carter
Donald B. Sargent